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NOTES.

DISPOSITION OF ACCUMULATIONS UNDER NEW YORK STATUTES.—Under New York statutes a direction for the accumulation of the rents and profits of land or the income of personal property is invalid unless such accumulation is directed to commence within the time limited for the suspension of the power of alienation or absolute ownership, 1 R. S. 726 §§ 37, 38; id 773 § 3; see also laws 1896, c. 547 § 51; Laws 1897, c. 417, § 4; *Manice* v. *Manice* (1871) 43 N. Y. 303, is for the sole benefit of a minor or minors, *Pray* v. *Hegeman* (1883) 92 N. Y. 508; *Draper* v. *Palmer* (1889) 27 N. Y. State Rep. 510, and is limited to his or their minority. *Manice* v. *Manice,* supra. The statute provides that "When in consequence of a valid limitation of an expectant estate, there shall be a suspension of the power of alienation or of the ownership during the continuance of which the rents and profits shall be undisposed of, and no valid direction for their accumulation is given, such rents and profits shall belong to the person presumptively entitled to the next eventual estate." 1. R. S. 726, § 40; Laws 1896 c. 547, § 53. It is established that these sections are made applicable to personal property by 1 R. S. 773, § 2, and Laws 1897 c. 417, § 2 respectively. *Cook* v. *Lowry* (1884) 95 N. Y. 103. What is meant by the words "Shall belong to the person presumptively entitled to the next eventual estate"?

In *Manice* v. *Manice,* supra, the court said: "The intent of the statute, and not of the testator, must govern the disposition of this undisposed of fund. * * * The statute does not say the ultimate, but the next eventual estate. That is, the estate which is to take effect upon the happening of the event which terminates the accumulation." Thus in that case, where the testator directed trustees to apply certain of the income to his widow, B, for life, and directed a new trust at B's death to pay all the income to C for life, it was held that the next eventual estate was that of the trustees for C. The words "next eventual" are thus explained. But the question arises as to the meaning here of the

word "estate." This cannot mean merely a legal estate. In *Pray* v. *Hegeman*, supra, the testator left his residuary estate to executors to divide into shares, a share to be held in trust for each of his children, A, B, and C, the income of each share to accumulate until each child respectively was twenty-one years of age, and then to pay the income to each for life. A, B and C at twenty-one took an equitable life estate, and hence the court held that they were "presumptively entitled to the next eventual estate." If the term meant merely a legal estate it is evident that the statute would fail to cover the case, for there would be no "next" estate. An equitable estate satisfies the term, and hence the decision in *Manice* v. *Manice* is more strictly brought into line with *Pray* v. *Hegeman*, since the real result of the decision was that the surplus income went to C. In order to give full effect to the legislative intent to provide for all cases of invalid accumulations, and thus prevent, if possible, the application of the Statute of Distributions, it would seem that the word "estate" should include any substantial, beneficial interest in the legal estate or the corpus. The statute says the person "presumptively entitled." This cannot mean the person who will actually take the next eventual estate upon the happening at some future time of the contingency which terminates the accumulations or the present estate. Such a construction would nullify the word "presumptively" altogether. Since the person presumptively entitled can take the accumulations at once as they accrue, *Manice* v. *Manice*, supra, 385; *Matter of Crossman* (1889) 113 N. Y. 503, it follows that the presumption must be determined as of the present moment, i. e., the court must decide who would take the next eventual estate if the contingency happened now. This construction was well established by the results of the decided cases, *Manice* v. *Manice*, supra; *Pray* v. *Hegeman*, supra; *Cook* v. *Lowry*, supra, until the case of *U. S. Trust Co.* v. *Sober* (1904) 178 N. Y. 442. There the testator left his estate in trust to apply the income to the support of his minor sons A and B until they became twenty-one years of age and then to pay a fixed yearly sum to each for life. Upon A's death leaving issue, one-half of the estate with its accumulations was to go to such issue, but if A died without issue, said half was to go to B. Similar provisions were made with regard to B's share in the event of his death. When the action was commenced A and B had no issue. The Appellate Division (1903) 88 App. Div. 506, correctly applied the rule above-mentioned and gave the surplus income of A's share to B and vice versa, but the Court of Appeals declared § 53 inapplicable on the ground that no presumption could be indulged, and held that the surplus should be governed by the Statute of Distributions. In this the court clearly "made law" in order to avoid a gross inequality in case A should have issue, and the decision leaves the law on this point in confusion.

It is a theoretically sound doctrine that the absolute ownership of any portion of the accumulations at any given time is fixed by the facts existing as of that time, and that therefore the determination of the question as to who is presumptively entitled is unaffected by the facts as of the time when the claim is made in court. Most of the cases may be explained upon this theory—which was adequate to decide them—*Cochrane* v. *Schell* (1894) 140 N. Y. 516; *Manice* v. *Manice*, supra;

Pray v. *Hegeman* supra, (though it may be said that they do not expressly proceed upon any well defined principles, but seem largely governed by the justice of each case) except *Cook* v, *Lowry*, supra, which is inconsistent with it. There a testator left part of his residuary estate in trust to pay a fixed income to his infant daughter, B, for life. Upon her death leaving issue the whole of such part plus any accumulations was to go to such issue; if no issue, then to testator's sons, X and Y. B had issue, C. It was held that C was presumptively entitled and took not only the accumulations accruing from the time of his birth, but also those which had accrued prior to that time. Hence it is apparent that under this decision the words "shall belong" in § 53 are not to be construed as suggested above. Before the birth of C the undisposed of surplus income must have vested in some one, and since at that time X and Y were the persons presumptively entitled, it vested in them. But the court said that when C was born he became the person presumptively entitled to all the accumulations. It follows that the interest of X and Y must have been divested. There seems to be no inherent objection to this construction of the words "shall belong," in saying that the statute gives a vested interest to the person presumptively entitled at any given moment, capable of being converted into absolute ownership upon claim made by him, but subject to being divested by a condition subsequent, namely, the happening of an event which makes another the person presumptively entitled. Hence the accumulations not already paid should belong to the person presumptively entitled at the time when the claim is made in court. *Cook* v. *Lowry*, supra. This theory is as efficacious in preventing accumulations as the other, for under either the accumulations vest at once and their ownership is absolutely fixed upon payment over or claim made as they accrue. It is evident that neither theory renders accumulations in fact impossible, and when they have so accrued it is in no sense violative of the spirit of the statute to pay them to the person who at that time is presumptively entitled. While this theory is based upon a construction of the statute possibly less obvious than the other, it explains all the cases and seems the only one upon which the other cases can be brought into accord with the important case of *Cook* v. *Lowry*, and a recent decision in the Appellate Division justified. *St. John* v. *Andrews Institute for Girls* (1907) 102 N. Y. Supp. 808.

In the latter case a testator devised the residue of his estate to executors in trust to pay the income to his wife for life, and directed that upon her death a part of the residue should go to a charitable corporation to be formed by the executors within two lives in being, and declared that in case the gift to said corporation should fail, the property should go to the Smithsonian Institution. The wife perished with the testator and the Andrews Institute was subsequently formed as directed. The question was as to who should take the undisposed of income which had accrued prior to the formation of the Andrews Institute. The court, per Laughlin, J., not mentioning *Cook* v. *Lowry* and relying upon the *Manice* and *U. S. Trust Co.* cases, found a valid trust in the executors to pay over the fund to the St. Andrews Institute when formed and decided that the latter was "presumptively entitled to the next eventual estate" and took all the accumulations. Assuming the existence and validity of

the trust, at any time before the formation of the Andrews Institute the Smithsonian Institution could have obtained the accruing surplus income, *Manice* v. *Manice*, supra 385, but this interest was divested by the happening of the contingency which created a new person "presumptively entitled to the next eventual estate." *Cook* v. *Lowry*, supra. This was not the line of reasoning followed by the court, which seemed to hold that the St. Andrews Institute was presumptively entitled before it was formed. This is clearly unsound as it presents the anomaly of the accumulations vesting in a person not in esse. It should be noted that if the trust had ceased *ipso facto* upon the formation of the Andrews Institute, the latter would not then have been presumptively entitled, and the right of the Smithsonian Institution would not have been divested.

SUIT AT LAW UPON A COVENANT OF OPTION INVALID UNDER THE RULE AGAINST PERPETUITIES.—In the case of *London & The S. W. Railway* v. *Gomm* (1882) L. R. 20 Ch. Div. 562, it was held, overruling *Birmingham* v. *Cartwright* (1879) L. R. 11 Ch. Div. 421, and followed in *Woodall* v. *Clifton* (1904) L. R. 2 Ch. Div. 257, that a covenant of option to repurchase, which right might not be exercised within the period allowed by the Rule against Perpetuities, was subject to that rule and void for remoteness. Specific performance of such a covenant was therefore denied. The question then arises whether a suit at law upon such a covenant is maintainable. A recent decision in England has held that it is. *Worthing Corporation* v. *Heather* (1906) L. R. 2 Ch. Div. 532. There specific performance of an option to purchase was refused upon the authority of the preceding cases; but damages were awarded for breach of the contract at law. Curiously enough, this is the first time the precise question has ever arisen in a case; but T. Cyprian Williams, Esq., in an article in 42 Sol. Jour. 650 (1898), seemingly anticipating the point, came to an opposite conclusion. It is submitted, however, that the view taken in the principal case is sound. It is clear that the ground for refusing specific performance is that when the grantee gives notice of his election to exercise the option and call for a conveyance he will be regarded in equity as having an equitable interest in the land; and if he may exercise that option at a time far remote, then his contract right to exercise it will ripen into an equitable interest at such remote time, which is obviously in contravention of the Rule against Perpetuities. *London & S. W. Ry.* v. *Gomm*, supra; *Woodall* v. *Clifton*, supra. But it is only in equity that such an agreement can create an interest in property; and it is only where a future interest in property is created that the rule applies. At law there is merely a personal contract. The Rule against Perpetuities is not, therefore, directly applicable to a suit at law upon such a contract. But it may be that on other grounds the contract even at law tends to contravene public policy. Unless this is the case, an action for damages should be maintainable. There are three conceivable reasons why the courts might hold such an agreement unenforcible at law. First, to allow a suit at law upon the contract may offend the spirit of the Rule against Perpetuities. Second, it may stimulate the performance of an act which is contrary to some definite rule of public policy. Third, the contract itself may be obnoxious to the general policy of the law against restraint